

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
WESTERN SECTION

FILED
IN CLERK'S OFFICE
2005 MAR -4 P 2:12
U.S. DISTRICT COURT
DISTRICT OF MASS.

DONALD P. MULLER,

Plaintiff,

vs.

POLICE OFFICER JOSE TORRES,
et al.,

Defendants.

C. A. No. 3:04-CV-30185-KPN

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO COMPLY
WITH ORDER OF THE COURT AND FAILURE
TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Comes now the Defendant Westfield Police Department and Defendants Jose Torres, Edward O'Brien, Michael Coach and Michael McCabe, by and through their attorney of record, and pursuant to Fed. R. Civ. P. 12(b) (6), do hereby move the Court for an Order to enter to dismiss the Amended Complaint of the Plaintiff as filed with the Court on February 10, 2005.

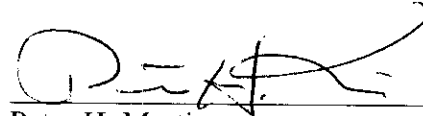
This motion is supported by good cause in that:

1. By Order entered December 27, 2004, Plaintiff's initial Complaint was stricken. Plaintiff filed an Amended Complaint with the Court on February 10, 2005. Per the December 27, 2004 Order, the Amended Complaint was due to be filed with the Court January 14, 2004.
2. The Westfield Police Department is not an entity with the capacity to sue or to be sued.

3. The claim or claims as asserted in Plaintiff's Amended Complaint are time-barred.
4. The claims or claims as asserted in Plaintiff's Amended Complaint are barred by the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion).

The grounds for dismissal are further supported by good cause as set forth in the Memorandum of Law in Support of Defendants' Motion To Dismiss For Failure To Comply With Order Of The Court and Failure To State A Claim Upon Which Relief Can Be Granted as filed with the Court contemporaneously herewith.

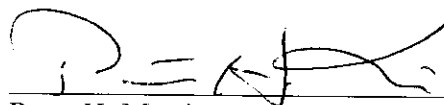
WESTFIELD POLICE DEPARTMENT,
POLICE OFFICERS JOSE TORRES,
O'BRIEN, MICHAEL COACH and
MICHAEL McCABE
DEFENDANTS
BY THEIR ATTORNEY



Peter H. Martin
BBO No. 552020
Assistant City Solicitor
59 Court Street
Westfield, MA 01085
413/572-6260

LOCAL RULE 7.1 CERTIFICATION

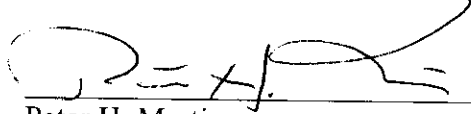
I, Peter H. Martin, hereby certify that on February 10, 2005 I received a telephone call from Plaintiff Donald Muller in which we discussed the status of his amended complaint.



Peter H. Martin

CERTIFICATE OF SERVICE

I, Peter H. Martin, do hereby certify that a true copy of the foregoing document was served upon the Plaintiff by U.S. Mail, first class, postage prepaid, addressed to Donald P. Muller, 769 Worthington Street, Springfield, MA 01105 on this the 4th day of March, 2005.



Peter H. Martin